In the Supreme Court of the United States.

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, PETITIONER,
v.
WESLEY L. SISCHO. } No. 313.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

MOTION TO ADVANCE.

Comes now the Solicitor General, on behalf of the petitioner in the above-entitled cause, and respectfully moves the court to advance said cause for argument on a date not earlier than the first Monday of February, 1922, or as soon thereafter as convenient.

This is a case in which the United States are concerned, which also involves a matter of general public interest, viz, whether or not the various provisions of the customs laws of the United States are applicable to the importation into this country of articles whose importation has been absolutely prohibited by law. It is claimed that the decision of the Court of Appeals for the Ninth Circuit in the case at bar is contrary to the decisions of the Courts of Appeal for the Second and Eighth Circuits, and it is important, in the ad-

ministration of the laws of the United States relating to the importation of prohibited articles, to have the law settled by this court.

JAMES M. BECK,
Solicitor General.

December, 1921.

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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1921.

UNITED STATES OF AMERICA, Petitioner, *against* WESLEY L. SISCHO.	No. 313.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF SUBMITTED BY CLETUS KEATING, COUNSEL FOR DEFENDANT-IN-ERROR IN THE CASE OF UNITED STATES OF AMERICA, PLAINTIFF-IN-ERROR, AGAINST JOHN REED, DEFENDANT-IN-ERROR, NOW ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AMICUS CURIAE.

STATEMENT OF THE CASE.

On April 29, 1918, the United States filed a complaint in the District Court of the United States for

the Western District of Washington, under section 5803 Compiled Statutes, 1918, against WESLEY L. SISCHO, master and owner of the gasoline launch *Nellie Evelyn*, to recover a penalty of $6400. claimed to be due under Section 2809 Revised Statutes, for failure to manifest certain alleged merchandise, to wit: 100 tins of smoking opium brought into the United States in his launch by the defendant (*R., pp. 1 and 2*).

Upon a general denial being filed, the case was tried before Judge Cushman, a jury having been waived.

The record is barren of the evidence offered on the trial and even Exhibit #1 introduced on the trial, does not appear in the record (*Record, p. 4*).

The District Court entered judgment against the United States (*R., p. 19*). Judge Cushman in a carefully considered opinion (*R., pp. 4-19*) 262 Fed. 1001, held that smoking opium, the importation of which is absolutely prohibited, was not "merchandise" within the meaning of the Revised Statutes which defines "merchandise" (Sec. 2766) as "goods, wares and chattels of every description capable of being imported" and hence there was no duty on the master to include it in the cargo manifest under R. S. 2809.

The District Court further held that as the importation and sale of smoking opium are absolutely prohibited under any circumstances, it could have no market value in the United States; that the smoking opium having no market value, the United States could not, in any event, collect a penalty under section 2809, which provided "the master shall be liable to a penalty equal in value of such merchandise not included in such manifest."

The only evidence offered on the question of the value of the opium was that Sischo had paid $6400. for the opium in British Columbia (*Record, p. 20*). Traffic in smoking opium is also prohibited in British Columbia (*Record, p. 14*).

On a writ of error to the Circuit Court of Appeals for the Ninth Circuit, the judgment of the District Court was affirmed, Judge Hunt dissenting (*R., pp. 29-38*), 270 Fed. 958.

Thereafter this writ of certiorari was granted on the application of the United States which alleged that the decision of the Court of Appeals for the Ninth Circuit was contrary in effect to the decision of the Court of Appeals for the Second Circuit in *Feathers of Wild Birds* vs. *United States*, 267 Fed. 964, and of the Court of Appeals for the Eighth Circuit in *Estes* vs. *United States*, 227 Fed. 818.

Questions Involved in the Case.

The three principal questions involved in the case are:

(1) Whether smoking opium, the importation of which is absolutely prohibited under serious penalties by the Opium Act, is "merchandise" within the meaning of the Revised Statutes, which define "merchandise" (Section 2766 R. S.) as "goods, wares and chattels of every description capable of being imported."

(2) Assuming that smoking opium is "merchandise" within the meaning of the Revised Statutes, was not section 2809 of the Revised Statutes requiring the

manifesting of "merchandise" repealed by the Opium Act in so far as smoking opium is concerned?

(3) Can Sischo be held liable for $6400 under Section 2809, which provides that "the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest," when smoking opium has not any market value in the United States or British Columbia where it was obtained.

FIRST POINT.

SMOKING OPIUM IS NOT "MERCHANDISE" WITHIN THE MEANING OF THE REVISED STATUTES AND THEREFORE SISCHO WAS NOT REQUIRED TO INCLUDE OR DESCRIBE IT IN THE MANIFEST.

There are three kinds of manifests provided for by law—one for cargo, R. S. Section 2806; one for passengers, R. S. Section 2807, paragraph 5, and one for sea stores, R. S. Section 2807, paragraph 6.

The Government seeks to recover a penalty under section 2809 for failure to include 100 five-tael tins of smoking opium on the cargo manifest of the *Nellie Evelyn*.

Section 2806 of the Revised Statutes prohibits the bringing in of any "merchandise" from any foreign port into the United States by any vessel unless the master has on board manifests in writing of the cargo, signed by such master.

Sections 2807 and 2808 provide what the manifest shall contain and how the "merchandise" destined to be

delivered at different districts or ports, shall be listed and arranged thereon.

Section 2809, which is the basis of the Government's alleged cause of action, provides as follows:

> "If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers or crew of such vessel, shall be forfeited."

Section 2766 of the Revised Statutes, defines "*merchandise*" as follows:

> "The word 'merchandise' as used in this Title (R. S. 2517-3129) may include goods, wares and chattels of every description capable of being imported."

Under the Acts of Congress of February 9, 1909, and January 17, 1914, commonly known as the Opium Act, the *importation* of smoking opium, or opium prepared for smoking, is absolutely prohibited under severe penalties. It is a little difficult to understand, therefore, how smoking opium can be brought within the definition of "merchandise" under Section 2766 of the Revised Statutes, which says that "merchandise" shall consist of goods, wares and chattels "capable of being imported."

If smoking opium is not "capable of being imported," it is obviously not "merchandise" within the meaning of the Statute.

Such was the holding of the District Court and of the Circuit Court of Appeals. The same result was reached by the District Court of the Eastern District of New York in *United States* vs. *John Reed,* 274 Fed. 724.

The case under this point presents a pure question of statutory construction as to the meaning of the word "merchandise" when defined as "goods, wares and chattels of every description capable of being imported."

The cases cited by the Government under Statutes which do not so define "merchandise" do not throw any light on the problem.

United States vs. *Thomas,* 4 Ben. 370, 373-375, cited at pages 9 and 16 of the Government's brief, was an indictment for smuggling nutmegs and was brought under the Act of July 18, 1866, which Act did not define "merchandise" as goods, wares and chattels *"capable of being imported."* The importation of nutmegs was not forbidden.

United States vs. *Claflin,* 13 Blatch. 178, 186, cited by the Government at pp. 9 and 16 of its brief, was an indictment for smuggling silk and was also brought under the Act of July 18, 1866 which did not define "merchandise." The importation of silk was not forbidden.

United States vs. *Kee Ho,* 33 Fed. 333, cited by the Government at pp. 9 and 16 of its brief, was also brought under the Act of July 18, 1866. In this case there was an indictment for smuggling smoking opium. At the time this case arose, the Opium Acts had not been passed

and it was not unlawful to import opium unless the importer was a Chinese. There was no question of the meaning of "merchandise" involved in this case at all.

In *Estes* vs. *United States,* 227 Fed. 818, cited at pp. 2 and 10 of the Government's brief, and on which the Government relied on its application for a writ of certiorari in this case, cattle were imported into the United States without first being inspected as required by regulations of the Department of Agriculture.

The case has no bearing whatsoever on the meaning of the words "capable of being imported" because the cattle were "capable of being imported" and the prosecution was for importing them without complying with the law with respect to inspection.

Daigle vs. *United States,* 237 Fed. 159, cited at pp. 11 and 21 of the Government's brief, was a case somewhat similar to *Estes* vs. *United States.* It did not involve any question with respect to the meaning of "merchandise" as defined by section 2766. The case instead of supporting the Government's contention, is directly opposed to it.

In the third count of the indictment, the Government alleged that certain potatoes were illegally imported into the United States contrary to law in that they were brought in without offering them to a Customs Officer for inspection. The Government sought to support the indictment under sections 3082 and 3097 of the Revised Statutes.

The Court, however, held that under the provisions of section 3097 merchandise of which entry must be made, is *"merchandise subject to duties"* and as the potatoes in question were not *"merchandise subject to duty"* the failure to make entry of them was not a viola-

tion of the provisions of that section. The Court, however, held the defendant for a breach of section 3100 of the Revised Statutes, because importation was forbidden and the goods had not been unladen in the presence of, or inspected by an inspector or officer of the Customs of the said United States at the first port of entry or Custom House where the merchandise had arrived.

Section 3100, however, deals with "all merchandise and all baggage and effects of passengers and *all other articles* imported into the United States" an express recognition by Congress of the limitation it had placed on the word merchandise.

It will be seen from the quotation just given that Section 3100 is not limited to "merchandise" as defined by Section 2766, but is of more general application and applies as well to "all baggage and effects of passengers and *all other articles* imported into the United States."

In *Feathers of Wild Birds* vs. *United States* (cited at pp. 2 and 13 of the Government's brief), 267 Fed. 964, the sole question involved was whether goods forbidden of importation but nevertheless brought into the country, were subject to forfeiture. There was no question involved in this case as to the meaning of the word "merchandise" as defined by Section 2766 of the Revised Statutes. It only involved the question of whether the feathers were forfeitable as having been brought into the country contrary to law.

The case of *Harford* vs. *United States,* 8 Cranch 109, cited at pages 13 and 21 of the Government's brief and on which the Government states at p. 21, it mainly relies, was a case brought under the Act of March 2, 1799

for forfeiture of certain goods, the character of which does not appear. The opinion states:

> "The principal question in this case is, whether goods and merchandise, the importation of which into the United States was prohibited by the Act of 18th of April, 1806, vol. 8, p. 80, were within the purview of the 50th Section of the Act of 2nd of March, 1799, vol. 4, p. 360, so that the unlading of them without a permit, etc. was an offense subjecting them to forfeiture."

The Act of March 2, 1799, provided: "no goods, wares or merchandise shall be unladen without a permit." In the Act of March 2, 1799, "merchandise" was not defined as "goods, wares and chattels *capable of being imported.*"

It is not disputed that smoking opium would be "goods, wares and chattels," but it is disputed that smoking opium could be goods, wares and chattels *capable of being imported* in view of the Opium Act.

The definition of "merchandise" as goods, wares and chattels "capable of being imported," first appeared in Section 2766 of the Revised Statutes enacted June 22, 1874. Previous to that the word "merchandise" had not been limited by the words "capable of being imported." Although sixty-eight years have passed since the enactment of the present statute the Government has been unable to cite a single case which supports its present contention.

Section 3082 of the Revised Statutes, the general smuggling statute, and Acts of Feb. 9, 1909, and Jan. 17, 1914, the smoking opium smuggling statutes, make pro-

vision not only for imprisonment and fine, but forfeiture as well, and the record shows in this case that the boat in which the opium was brought into the country, and the opium as well were forfeited and the defendant sentenced to a jail term.

A holding here that it is necessary for a master to manifest smoking opium, would be a serious hardship on innocent persons. In *United States* vs. *John Reed,* United States District Court, Eastern District of New York, 274 Fed. 724, now on writ of error to the Circuit Court of Appeals for the Second Circuit, the Government brought an action similar to the one here against the master of the *S.S. Royal Prince.* The Government conceded that Reed was innocent of all wrong doing and had no knowledge or means of knowledge that the opium had been secreted by certain members of his crew on their persons. To hold in the Reed case that it was Reed's duty to manifest the opium, would be in fact a holding that Reed would have had to discover a crime by one of his crew and then make the crime his own by putting the opium on the ship's manifest, a thing expressly forbidden under serious penalty by the Opium Act.

It has already been shown that there are ample remedies open to the Government to punish smugglers and to forfeit the goods attempted to be smuggled. It is submitted that the meaning of the statutes should not be stretched so as to inflict a civil penalty on an innocent master for failure to include in his manifest certain goods whose importation is forbidden under serious penalties and concerning which he knew nothing.

Unless the words "capable of being imported" are given the meaning here contended for, they do not add anything whatsoever to the words "goods, wares and chattels."

That Congress plainly intended to limit "merchandise" to goods, wares and chattels *capable of being imported* is shown by the use of other words in other parts of the Statutes.

Section 2537 refers to "all cargoes chargeable with duties."

Section 2795 refers to "articles."

Section 3074 refers to "property" subject to forfeiture.

Sections 3074 and 3077 refer also to "property."

Section 3076 refers to "property" and "articles."

Section 3086 refers to "merchandise" or "property of any kind."

Sections 3100-3102 refer to "all merchandise" "all baggage and effects of passengers and all other articles."

It is submitted that the decision of the District Court and of the Circuit Court of Appeals on this point should be affirmed.

SECOND POINT.

ASSUMING THAT SMOKING OPIUM IS "MERCHANDISE" WITHIN THE MEANING OF THE REVISED STATUTES, THE PROVISIONS OF SECTION 2809 WERE REPEALED BY THE OPIUM ACT IN SO FAR AS SMOKING OPIUM IS CONCERNED.

The Acts of Congress of February 9, 1909 and January 17, 1914, commonly known as the Opium Acts, Section 1, make it unlawful under any circumstances to import into the United States smoking opium or opium prepared for smoking.

Section 2 of the Opium Act provides that "any person who shall fraudulently or knowingly bring into the United States or assist in so doing, any opium contrary to law, or shall receive, conceal, buy or sell, or in any manner facilitate the transportation, concealment or sale of such opium, shall be fined a sum not exceeding $5000. or be imprisoned for two years or both".

Section 4 provides that any person who shall receive or have in his possession, conceal on board of or transport on any foreign or domestic vessel, destined to or bound from the United States, any smoking opium or opium prepared for smoking, shall be subject to the penalty provided in section 2.

Section 5 provides that no smoking opium or opium prepared for smoking shall be admitted into the United States for transportation to another country nor shall it be transported or transhipped from one vessel to another vessel within any waters of the United States for immediate exportation or any other purpose.

It sems hardly conceivable that Congress could have intended to prohibit absolutely the importation of smoking opium and to make it a crime to have it in one's possession or transport it on a vessel bound to or from the United States, and, at the same time, leave standing Section 2809, which would require of the master, assuming that smoking opium is "merchandise", that he place the same on the manifest, which action on his part would be criminal under the Opium Act.

The situation is quite analogous to that which was passed on by the Supreme Court in *United States* vs. *Boze Yuginovich*, decided June 1, 1921. There the defendants were indicted for violation of the Internal Revenue Laws. The first count charged the defendants with unlawfully engaging in the business of distillers within the intent and meaning of the Internal Revenue Laws of the United States, and that they distilled spirits subject to the Internal Revenue Tax imposed by the laws of the United States, and defrauded and attempted to defraud the United States of the tax on said spirits. The second count, based on Section 3279 charged the defendants with failing to keep on the distillery conducted by them, any sign exhibiting the name or firm of the distiller with the words "Registered Distillery" as required by Statute. The third count charged the defendants with carrying on the business of distilling without giving a bond as required by law. The fourth count charged the defendants with unlawfully making a mash, fit for distillation, in a building not a distillery duly authorized by law.

The defendants apparently operated a moonshine still.

The defendants interposed a motion to quash the indictment and filed a demurrer on the ground that the Acts of Congress under which the indictments were found, were repealed by the Volstead Act.

The Court affirmed the judgment of the Court below, quashing the indictment and sustaining the demurrer.

Mr. Justice Day said:

> "We agree with the Court below that while Congress manifested an intention to tax liquors illegally as well as those legally produced, which was within its constitutional power, it did not intend to preserve the old penalties prescribed in Section 3257 in addition to the specific provision for punishment made in the Volstead Act.
>
> "We have less difficulty with the other sections of the prior revenue legislation under which the charges already set forth, are made. We think it was not intended to keep on foot the requirement as to displaying the words: 'Registered Distillery' in a place intended for the production of liquor for beverage purposes which could not longer be lawfully conducted; nor to require a bond for the control of such production; nor to penalize the making of mash in a distillery which could not be authorized by law."

The application of the *Yuginovich* case here contended for, was adopted by the United States District Court for the Eastern District of New York, in *United States* vs. *John Reed,* 274 Fed. 225-227.

We submit that it could not have been the intention of Congress to keep on foot the requirement of includ-

ing in a manifest smoking opium which could be no longer imported under any circumstances.

THIRD POINT.

IN ANY EVENT THE UNITED STATES FAILED TO PROVE THE VALUE OF THE OPIUM AND HENCE IS NOT ENTITLED TO RECOVER THE PENALTY PROVIDED FOR IN SECTION 2809.

Section 2809, which is quoted at page 5 of this brief, provides that "the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest."

It was therefore part of the Government's case to prove the value of the smoking opium at the time of its arrival in the United States.

The only proof adduced by the Government on this point was that the master had paid $6400. for it in British Columbia (*R., p. 20*).

As the importation of smoking opium is absolutely prohibited, and its sale forbidden in the United States under any circumstances, it cannot have any market value here. It can scarcely be contended that because there may be some illicit dealings in smoking opium in this country, that the price paid in such criminal dealings, can be the basis of fixing the value necessary in order to determine the penalty provided for by section 2809. Even if such evidence were competent the Government did not produce it.

In fact, the Revised Statutes provide that the market price at the first port or district where landed, shall govern the amount of any penalty.

Section 2872 of the Revised Statutes provides that no "merchandise" brought in on any vessel shall be unladen except in open day and not at any time without a permit from the Collector.

Section 2874 of the Revised Statutes provides as follows:

> "All merchandise, so unladen or delivered contrary to the provisions of Section 2872, shall become forfeited, and may be seized by any of the officers of the Customs; and where the value thereof, according to the highest market price of the same at the port or district where landed, shall amount to $400. the vessel, tackle, apparel, and furniture, shall be subject to like forfeiture and seizure."

We think it fairly appears from the foregoing that Congress in dealing with breaches of the Revenue Laws with respect to receipt and delivery of "merchandise" for which it provided penalties of various kinds, intended that the value of the merchandise, where it was material, should be determined by the market value at the port or district where landed.

It would not be fair to assume that Congress intended to have the penalty provided for in section 2874 determined by the market value of the "merchandise" at the port or district where landed and have the penalty provided for in section 2809, both of which are part of the same Act, determined by the value of the "merchandise" at some other place.

The Government offered no evidence whatsoever with respect to the market value of the smoking opium at the port or district where landed. In view of the prohibition against the import and sale of smoking opium under any circumstances whatsoever, the Government, of course, could not have offered any evidence as to market value at the port or district where landed.

As pointed out, the only evidence of value is what the master paid for it in British Columbia. The sale of smoking opium is also forbidden in British Columbia. (R., p. 14). It is impossible, therefore, on any theory of the case, to place a value on the smoking opium which would not be based solely on the result of an illicit sale.

LAST POINT.

THE JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED.

CLETUS KEATING,
(Counsel for Defendant-in-Error in the case of United States, Plaintiff-in-Error, against John Reed, Defendant-in-Error, now on Writ of Error to the Circuit Court of Appeals for the Second Circuit),
Amicus Curiae.